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No. 07-476

IN THE

United States Supreme Court

HOWARD THALER,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the Second Circuit, precise calculation of a guidelines range is not required, particularly where a loss determination may be complex, if the sentencing judge, after announcing compliance with 28 U.S.C. § 3553(a), makes a decision to impose a non-guideline sentence. Other Circuits require a precise determination of the range in the first instance. Which view is correct?

2. Does it violate Due Process to allow a judge to enhance a guidelines calculation for obstruction of justice, where the jury has acquitted the defendant of that count of the indictment?

3. In a fraud prosecution, calculation of "loss" or "intended loss" for the purpose of a guidelines calculation often trumps other factors and effectively determines the length of the recommended length of imprisonment. The Circuits are hopelessly divided on how to approach the question, with the Fifth Circuit holding, contrary to the Second Circuit, among others, that the calculation should be made in the same manner as a court would ascertain damages in a civil case. If that approach be taken, the 12 level enhancement accepted by district court cannot stand. Is the Fifth Circuit's approach mandated by due process, and can the district court avoid the issue by saying that, even if there be an error in calculation, it would impose the same sentence?

4. In fixing the amount of restitution, is a court limited to the damages that a victim could obtain in a civil case, namely the loss of the bargain, or is

the victim entitled to a windfall, by receiving amounts over and above actual loss incurred or amounts over actual profit or both made by a defendant over an unlimited period of time, even though there was no harm and no subsequent illegal behavior?

5. At trial, the district court permitted the prosecution to put the decision of the state appellate court that disbarred the petitioner some seven years earlier into evidence. The order consisted of a list of charges with broad conclusions assailing the petitioner's character, but did not include the specific misconduct for which petitioner was disbarred. The Court of Appeals agreed with petitioner that reception of that evidence was error but found that it was harmless because petitioner had not challenged the loan documents or other documentary evidence. The defense had contested the issue of intent, which was petitioner's defense at trial. Did the Court of Appeals follow the correct approach in finding harmless error in allowing into evidence the Appellate Division order?

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OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York in a summary order. The summary order is not published in the Federal Reporter. It may be found at 2007 U.S. App.Lexis 8765 (2d Cir.). It is included in the appendix along with the order denying rehearing.

JURISDICTION

The decision and judgment of the Court of Appeals was entered on April 5, 2007. A timely petition for rehearing and rehearing *en banc* was denied on June 8, 2007. Justice Ginsberg extended the time to file this petition up to and including October, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amdt V: "No person shall ... be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction

Petitioner, Howard Thaler ("petitioner" or "Thaler") stands convicted of one count of conspiracy, five counts of mail fraud, one count of wire fraud, and four counts of making false statements in connection with the submission of six different mortgage applications containing materially false information, following a jury trial in the United States Dis-

trict Court for the Southern District of New York (Brieant, J.). He was sentenced to 84 months imprisonment, a fine of $250,000, and restitution in the sum of $522,496.54 which was paid in full on or about June 30, 2006.

Judgment was entered on March 9, 2006, and petitioner remains incarcerated pursuant to the judgment. On April 5, 2007, a panel of the United States Court of Appeals for the Second Circuit affirmed the judgment. (Sack and Sotomayor, C.JJ.; Radkoff, D.J.). On June 8, 2007, the Court denied rehearing and rehearing *en banc*.

B. The Indictment

The indictment charged petitioner with aiding and abetting prospective homeowners to submit false financial information in applications for residential real estate mortgages. (Ind. ¶ 6-7; A. 32-33).[1] It also alleged that he aided and abetted the submission of false HUD-1 Settlement Statements and other false loan documents to the Federal Housing Administration ("FHA") and the Department of Housing and Urban Development ("HUD").

In four substantive counts of mail fraud and one count of wire fraud, Thaler was charged with engaging in schemes to fraudulently obtain five different

[1] Although petitioner had been disbarred from the practice of law in New York, *see Matter of Thaler*, 243 A.D. 2d 40, 674 N.Y.S. 2d 89 (2d Dept. 1998), operation of a real estate agency in the fashion undertaken by petitioner does not necessarily constitute the practice of law. *See Restatement (Third) of the Law Governing Lawyers*, § 4 comment c (1998).

home mortgage loans on dates between March 2000 and November 2002. (Ind. Counts 2, 3, 4, 7, 8; A. 28-31; 33-34). Counts 2, 3, and 4 each identified the borrower, the lending institution, the amount of the mortgage, the mailed matter or wire transmission and the date of the mailing or transmission. Count 7 alleged that Thaler engaged in a scheme to defraud an individual for whom he purported to act as an attorney. Count 8 alleged that Thaler engaged in a scheme to obtain $165,000 from the estate of a deceased individual. (A. 34)

Counts 5 and 9 alleged that Thaler caused materially false statements and documents to be made in connection with two different mortgage applications, where the loans were insured by the FHA and HUD, in violation of 18 U.S.C. § 1001. (A. 31, 35) Count 6 and 10 alleged that Thaler caused a mortgage loan application file to be submitted to HUD knowing that it contained false and fraudulent statements in connection with a loan to be insured by the FHA, in violation of 18 U.S.C. § 1010. Count One charged Thaler with conspiracy to commit the substantive offenses.

Count 11, on which Thaler was acquitted, alleged that in 2004 he conspired with others to make materially false statements and to make and use false documents in matters within the jurisdiction of the executive branch, and to obstruct the due administration of justice, in violation of 18 U.S.C. § 1001 and § 1503. (A. 36-38)

C. Summary of the Facts

1. The Real Estate Transactions

The proof at trial consisted of six loan transactions during an approximate three-year period of time. Four involved the purchase of a property by Thaler, or by Thaler and a deceased co-defendant, William Fallow, and the subsequent sale of the properties to purchasers whom Thaler assisted in obtaining mortgages. Petitioner and Falow had been attorneys, practicing law together. Both were disbarred in 1997 and 1998, respectively, and the orders of their disbarment were introduced into evidence.[2] After 1998, Thaler started a mortgage brokerage called McLean Capital. He was a licensed real estate and mortgage broker. (Tr. 224, 226-227).

Another transaction involved Thaler's purchase, in a corporate name, of a part of a larger property that was being sold by a client for whom Thaler acted as an attorney. Another transaction was orchestrated and conducted entirely by a co-conspirator, the government's star witness, Lawrence King.

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[2] Initially, only parts of the orders disbarring the defendants and prohibiting them from acting or holding themselves out as attorneys were admitted into evidence. (GX1; 40-45; GX2; A. 46-50). Later in the trial, the court erroneously admitted the full text of the decision disbarring Thaler, which included a list of charges that were sustained, rather than a description of conduct, and the hearsay conclusions of an Appellate Division Panel regarding Thaler's lack of fitness to practice law. (GX2A; A. 51-55).

In all but one of the loan transactions, the lending institutions received all their interest and principal payments or had the loans satisfied in full upon a sale or refinance. Each of the properties was legitimately appraised at or more than the purchase price. The homeowners acquired homes that increased in value and some of them received proceeds from refinancings. In the one situation where there was a foreclosure, because the homeowner died, Thaler did not solicit or have any contact with the purchaser of the lender and did not participate in the loan application. He simply lent money to a co-conspirator who obtained a loan from a relative.[3] And while this loan was sold at discount when it was nonperforming, the ultimate mortgagee in foreclosing on the security actually made a profit on completion of the foreclosure—indicating that this property, too, was properly appraised initially and collateralized. (Tr. 807; *See* Defendant's Sentencing Memorandum, Exhibit B)

The evidence at trial consisted of the testimony of a cooperating witness, Lawrence King, who found most of the buyers for the properties and participated in or discussed each of the transactions with Thaler and Falow, or both, together with the testimony of the purchasers/borrowers, and the testimony of representatives of the lending institutions. King, a licensed real estate salesperson, was the owner of a real estate management agency with managed multiple family properties for over twen-

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[3] That lender's loss was computed at sentencing as approximately $78,000.

ty years. Whenever he found a property or a purchaser for Thaler and Falow, he earned referrals fees from one of the mortgage brokers, Dino Lucido. (Tr. 189-191; 398-399). In several of the transactions, he signed documents on behalf of the corporations owned by Thaler and Falow. (Tr. 134, 147).[4]

In the Counts involving Coker, Sosa and Valesquez (Counts 3, 1 and 2), it was alleged that Thaler assisted these buyers by transferring funds temporarily into their accounts so that they could qualify with the lenders' asset requirements. (Tr. 143, 615-617, 624, GX 92; GX 7, 8, Tr. 434, 436) In the Count involving Velasquez, it was also alleged that Thaler assisted Mr. Velasquez with a "stated income" loan application where Thaler advised him to inflate his income figure knowing that the information would not be verified by the lender. (Tr. 489-494, GX 20, 21, 23, 25)

In the Richardson Count (Count 7), it was alleged that Thaler wrongfully had Richardson convey the deed to his small, vacant lot to Thaler without his knowledge. Thaler shortly thereafter transferred said lot to Hector Robinson for $35,000. (Tr. 932, 933) This, despite all the evidence that Richardson

[4] In addition to the transactions involving Thaler and Falow, King testified that he was involved independently in a transaction to purchase and immediately sell a property using a phony title report. (Tr. 187-188) For his testimony, King received a sentence of five years probation and he was ordered to pay $218,000 in restitution. (Tr. 211-212; 1110-13) Because the court ordered Thaler to pay the full amount of restitution prior to his direct surrender, which he did, King's restitution obligation on a loan he orchestrated was wiped out. (Tr. 3/9/06 at 6; A. 301).

who owned three properties was in contract previously to sell a house together with the subject lot to an investor, which deal fell through due to the purchaser's non performance. (Tr. 861, 863) Afterwards, when Thaler was requested to get involved, he arranged for the same property (house and lot) to be sold for an increased price. The house was to be sold to Alicia Trail (who would have acquired the house through the original investor) and Thaler would acquire the vacant lot. The end result was that Richardson, who was desperate to sell because his mortgage was in substantial arrears, sold his property for a higher price than he originally agreed to. (Tr. 904, 906, 923, 926) He received funds at the closing after paying all of his arrears. The fact that Thaler acquired the lot in lieu of the original investor (who wasn't going through with the deal anyway) is a distinction without a difference. While Richardson's actual knowledge was in dispute, the evidence showed that he received all and more than he originally bargained for. He was anxious to go through with the sale in any event. (Tr. 909, 911, 895, 1162, 1305, DX G, J)

In the Count regarding the Best Estate (Count 8), it was alleged that Thaler was aware and participated in a fraudulent deed conveyance at the closing of a property purchased by Mamie Kemper. This, despite the evidence that Thaler had no contact with the "purported" seller/ imposter and did not represent him. (GX 147, Tr. 1257) The "imposter" apparently passed muster with the lender's attorney, the buyer's attorney, and the title insurance

company, all who were independently represented and present at the closing.

What is striking is that since the closing on 9/2000 through the date of sentencing (March 2006), there has been no title claim against the property; Ms. Kemper's ownership has been uninterrupted and unchallenged and she successfully refinanced her house with title insurance issued on behalf of the lender. (Tr. 1024-1028) In addition to there being no claims against the title to the property by anyone, the witnesses who testified at trial who were related to Herbert Best never made any claim or allegation that the property was wrongfully conveyed. In fact, Herbert Best's sister testified that to her knowledge, he never owned a house. (Tr. 955, 957-958). Mrs. Best's cousin testified that the house was abandoned in 1999. It was uncontroverted that the house was abandoned, in bad shape, in foreclosure and just weeks from being auctioned off by the bank.

D. The Obstruction Allegations

The government initially charged Thaler with conspiracy and several substantive counts of obstruction of justice and making false statements in 2004, several years after the transactions. At the end of the trial, the government dismissed the substantive counts. (Tr. 1295) The jury acquitted the defendant on the remaining obstruction of justice count.

In February, 2004, the government recruited Larry King as a cooperating witness and outfitted

him with a tape-recorder in order to obtain incriminating evidence against Thaler. (Tr. 196; 1103-1106; GX151-164) King recorded a number of conversations involving Thaler and Falow, who died before the trial, and Salvatore Lobreglio, a retired police officer. (GX 127) The government's theory was that Thaler, Falow and Lobreglio encouraged King to make false statements to a HUD investigator and that they corruptly tried to direct him to an attorney who would advise him to assert his Fifth Amendment privilege. The government also claimed that Mr. Thaler attempted to obstruct justice in his brief statements to the prosecutor after he had received three grand jury subpoenas and was seeking time to respond.

Although the jury rejected those arguments, the court below nevertheless enhanced Thaler's offense level for obstruction of justice.

E. The Sentencing

At sentencing, the defendant challenged the guidelines calculation and made arguments about the sentencing factors specified in 18 U.S.C. § 3553. With respect to the guidelines, the defendant argued that the loss calculation was far too high because neither the lenders, who were fully collateralized, nor the homeowners, whose properties increased in value, suffered any pecuniary loss.

He argued that Georgina Sosa not only acquired a home that increased in value while she lowered her mortgage rate—the original bank's mortgage having been satisfied—but she also received rental

income from the property. Gilbert Richardson sold his property at a fair, agreed upon price, indeed at a higher price than he had previously been offered and accepted, under circumstances where he was desperate to get out from under mortgage payments he could not afford to make. Mamie Kemper was able to move into the house she most wanted, where her adopted children could live right next door to their adopted siblings. Angel Velasquez acquired a multi-family property he refinanced, satisfying the original mortgage, and from which he receives rental income. Abiodun Coker sold his property for an $18,000 profit. And, finally, considering all reasonable likelihoods, the Best Estate lost nothing. The property was abandoned, in bad shape, and in foreclosure. The bank's law firm thought it had accomplished service on the Bests and would surely have sold the property but for Mr. Falow's purchase of the note. The two Best relatives who testified made no claim against the sale proceeds or property from the sale that occurred five years earlier.

The defendant further argued that the evidence did not support an enhancement for obstruction of justice, a charge on which the defendant was acquitted, and that the two-level enhancement for violating a judicial order did not apply because it was otherwise addressed in the guidelines by the enhancement for abuse of trust. He also argued that a four-level enhancement for leadership role was not warranted.

The court rejected each and every argument and adopted the loss calculation, enhancements and guidelines range propounded by the government and the probation department. (Tr. March 9, 2006, at 23-27; A. 318-322) The court adopted the probation department's conclusion that at least three of the six real estate transactions resulted in losses to either the lender or the homeowner in excess of $200,000. Together with the enhancements, this resulted in a guidelines range of 97 to 121 months. (*Id.* at 54; A. 349). The Court imposed a sentence of 84 months and a fine of $250,000.00 which exceeded the guidelines range. The Court imposed restitution in the amount of $522,496.54, which included the current, increased market value of two of the properties. (*Id.* at 31-32, 42-45; A. 326-327, 337-340) The defendant was ordered to pay the restitution within 30 days of sentencing. The deadline was subsequently extended and the full amount was paid by June 1, 2006, effectively wiping out Lawrence King's restitution obligation on the Nancy Smith loan.

REASONS FOR GRANTING THE WRIT

A. The Second Circuit Follows a Procedure at Variance with Other Circuits on the Question Whether a District Court Must Correctly Compute the Applicable Guidelines Sentence Range

Last term this Court held that, a Court of Appeals could, but was not compelled to, apply a presumption that a guidelines sentence is reasonable. *See*, *Rita v. United States*, ___ U.S. ___, 127 S.Ct. 2456 (2007). Left open is whether an incorrect guidelines calculation may be ignored provided that the sentence imposed is otherwise determined to be "reasonable."

As in this case, rather than make a careful consideration of enhancements and computations, some district courts simply state that, even if a mistake was made in fixing a guidelines range, the court would impose the same sentence as "reasonable." (A. 351).

In the Second Circuit, a district court may follow this procedure, and, on review, the Court of Appeals will simply determine whether the resulting sentence is reasonable. *See*, *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (Cardamone, J., concurring), *cert. denied*, __ U.S. __, 126 S.Ct. 388 (2005); *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). Indeed, in *Crosby*, the fountainhead case in the Second Circuit, the Court of Appeals suggested that this might be the preferred course, where a "complex" calculation might be required to

determine loss. 397 F.3d at 112. So long as the sentencing judges complies with 3553(a) imposing a non-guidelines sentence, a "precise" determination of a guidelines range is unnecessary. *Ibid.*

In other Circuits, a three part test is employed, where, in the first instance, a determination is made that a correct guidelines range has been computed. *See, e.g., United States v. Miller*, 479 F.3d 984, 986 (8th Cir. 2007); *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007) (*en banc*), *cert. pending*. No. 06-11486. As the Eleventh Circuit correctly put it, *United States v. Booker*, 543 U.S. 220 (2005) requires "at a minimum. . . [that] the district court. . . calculate *correctly* the sentence range prescribed by the guidelines." *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005). (emphasis in original.)

Analysis of 28 U.S.C. § 3553 indicates that improper calculation of the guidelines range constitutes error. 28 U.S.C. § 3553(a)(2), requires the district court to consider the guidelines range and then impose a sentence that is "sufficient, but not greater than necessary." Reasonableness is *not* a standard for the district court. Rather it is the standard of appellate review, and is not applicable at the district court level. *See, United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006); McColgin & Sweitzer, *Grin and Bear It*, 29 Champion 50 (2005); Frase, *Punishment Purposes*, 58 Stan.L.Rev. 67, 83 (2005).

B. Acquitted Conduct May Not Be Used to Enhance a Sentence

Petitioner was acquitted of the count of the indictment charging obstruction of justice, but the district court found, by a preponderance of the evidence standard, that there was sufficient evidence of obstruction. The Second Circuit agreed.

Admittedly, the ruling below comports with this Court's decisions in *McMillan v. Pennsylvania*, 477 U.S. 79, 92 n.8 (1986); *United States v. Watts*, 519 U.S. 148 (1997); and *Harris v. United States*, 536 U.S. 454 (2002). As Justice Breyer noted in his concurrence in *Harris*, however, these holdings cannot be reconciled with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. Nonetheless, Justice Breyer supplied the pivotal vote because he not want to extend *Apprendi*.

Since *Harris*, *Apprendi* has, in fact, been extended, over Justice Breyer's protest. *See*, *Cunningham v. California*, ___ U.S. ___, 127 S.Ct. 856, 863-64 (2007) ("any fact that exposes a defendant to a greater potential sentence must be... established beyond a reasonable doubt, not merely by a preponderance of the evidence"); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *cf. Jones v. United States*, 526 U.S. 227, 252-53 (1999) (construing statute; facts "that present the prescribed penalty to which a criminal defendant is exposed... must be established beyond a reasonable doubt.")

In *Booker*, Justice Thomas took aim at the guidelines provision permitting a judge to find enhancement facts by a preponderance of the evidence. United States Sentencing Guidelines Manual § 6A1.3, comment (2001). He specifically noted that the Court's holding "corrects this mistaken belief" of the Guidelines Commission that such underlying facts need not be found beyond a reasonable doubt. *Booker*, 543 U.S. at 319 n.6 (Thomas, J. concurring in part and dissenting in part). A judge's use of the beyond a reasonable doubt standard in fact-finding at sentence proceedings is hardly unknown. *See*, *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

The several opinions of the Third Circuit, sitting *en banc*, in *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007) (*en banc*), *cert. pending* No. 06-11486, illustrate the tension in this Court's jurisprudence. The majority and the concurring opinions basically held that the Court was bound by *McMillan*, *Harris*, and *Watts*, until this Court explicitly overruled them. *See*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). The concurring opinions were, nonetheless, uncomfortable with those precedents. And, the dissenters no longer deemed them controlling.

The Third Circuit collected the decisions of the other Circuits, which were in accord with the majority holding, all of which deemed themselves bound by square precedent until this Court holds otherwise. Several district courts have questioned whether *McMillan*, *Harris* and *Watts* remain viable. *See*, *e.g.*, *United States v. Ibanga*, 454 F.Supp.2d 532, 536-538 (E.D.Va. 2006); *United*

States v. Coleman, 370 F.Supp.2d 661, 668-73 (S.D. Ohio 2005); *United States v. Pimental*, 367 F.Supp.2d 143, 149-53 (D.Mass. 2005); *United States v. Gray*, 362 F.Supp.2d 714, 721-212 (S.D.W.Va. 2005).

Grier presents this issue, but the Third Circuit remanded that case for re-sentencing. Thus, this Court may feel that the issue is not ripe for review in that case. Moreover, this case presents a far better record for review. In *Grier*, the defendant was not charged with the state crime in federal court, and the federal judge found him guilty of the offense by a preponderance.

Here, the jury *acquitted* the petitioner of obstruction of justice and the district court came to a contrary conclusion on a preponderance standard. The Second Circuit affirmed on precisely that basis. Hence, the issue is crystallized for this Court's review.

C. Under the United States Sentencing Guidelines, the Amount "Lost" Drives Up Sentences Almost to the Exclusion of Other Factors. Yet the Guidelines Provide No Clear Mechanism on How "Loss" is to Be Calculated and the Circuits Have not Agreed Upon a Method to Be Employed to Determine Loss. This Case Provides the Court with the Square Opportunity to Do So.

The United States Sentencing Guidelines provide that, upon conviction of any offense involving fraud, the sentence should be enhanced by the amount of the higher of the "loss" or "intended" loss. U.S. Sentencing Guidelines Manual, § 2B1.1 (2001). Although, as commentators have noted, this loss factor "drives up sentences almost to the exclusion of other factors," Gibeaut, *Open-Booker Test, In Bids for Resentencing, White-Collar Criminals Want Review of Loss Figures*, ABA Journal, February, 2006; *see also* Article, *White-Collar Defendants and White-Collar Crimes*, 116 Yale L.J. Pocket Part 286 (2007); Symposium: *Sentencing Guideline Law and Practice in a Post-Booker World: Rethinking Sentencing Post-Booker*, 37 McGeorge L.Rev. 757 (2006), the Guidelines provide no assistance. They simply state, "The Court need only make a reasonable estimate of the loss." U.S. Sentencing Guidelines Manual, § 2B1.1, cmt. 2(c).

As might be expected, the Circuits have failed to reach a consensus on the appropriate method to calculate loss. In *United States v. Ebbers*, 458 F.3d 110, 127-128 (2d Cir. 2006). The Second Circuit

struggled with the question, finding several methods invoked by expert witnesses flawed, but since the loss was well over the $100 million threshold for a 26 level enhancement, under any method, it found resolution of the question unnecessary, and ultimately found the sentence reasonable.

Other courts have pretty much left the issue to the discretion of the trial court, with limited appellate review, so long as the loss is not speculative. *See, e.g., United States v. Lee*, 427 F.3d 881 (11th Cir. 2005); *cf. United States v. Patrick*, 479 F.3d 760 (11th Cir. 2007) (district court unreasonably used organization's estimated tax liability to determine loss). Yet, as the the district court noted in *United States v. Adelson*, 441 F.Supp. 2d 506, 509, 510 (S.D.N.Y. 2006), "inordinate emphasis" on the amount of actual or intended loss can be a "kind of 'piling-on' of points for which the guidelines have frequently been criticized."

The best illustration of the confusion and need for some type of sensible standard is in the Government's argument in the Court of Appeals. The prosecution contended that the Court of Appeals did not need to determine loss accurately "because the District Court would have imposed the same sentence even if one or more of the adjustments which the [district] court has made are regarded to be inappropriate," Gov.Br., p70, quoting A. 351 and citing *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). It then offered alternative "theories" for determining loss: either $329,263.12 (which it claims is "loss" to "victims," consisting of an $80,000

"fraud" on Sosa, $49,263.12 from "fraud" in connection with the Smith loan; $35,000 from "fraud" on Richardson' and $165,000 in connection with the Best Estate) or $215,275.74 (which it computes as defendant's "gain", consisting of $58,847.04 on the Sosa matter; $35,000 on the Richardson matter; $6,500 on the Smith loan; and $115,928.70 on the Best estate).

None of these computations have any basis in economic reality. Applying the methods employed in other Circuits, specifically, *United States v. Fazio*, 487 F.3d 646 (8th Cir. 2007), *United States v. Rhodes*, 330 F.3d 949 (7th Cir. 2003) and *United States v. Lane*, 323 F.3d 568 (7th Cir.), *cert. denied*, 540 U.S. 819 (2003), results in a loss figure far less than $200,000.

Indeed, assuming that the "gain" figures are accurate—and they are not—there is a fallacy on the face of the record. The Government argued, and established, that defendant had one or more "partners" in each of the transactions, and the "partners" received their share of the compensation. Merely dividing the figures by two would result in a "loss", measured by defendant's gain, of $107,673.87, and patently impacts a guideline calculation.

In a highly persuasive opinion, the Fifth Circuit noted that complex factors underlie determination of loss, which must have occurred as a result of the fraud. *United States v. Olis*, 429 F. 3d 540, 547 (5th Cir. 2005). The panel suggested that sentencing courts should look to the measure of damages that would be awarded on the civil side of the court.

"The civil damage measure should be the backdrop for criminal responsibility. . ."

Olis has received good reviews from commentators, because it provides an articulable standard that is familiar to the judicial system and curbs the sentencing disparities underlying the creation of the United States Sentencing Commission in the first instance. *See* Gibeaut, *Open-Booker Test: In Bids for Resentencing White-Collar Criminals Want Review of Loss Figures*, A.B.A. Journal, February 2006; Comment, *Loss Causation in Fraud on-the Market Cases*, 3 Berkeley Bus.L.J. 337 (2006); Symposium, *Sentencing Guideline Law and Practice in a Post-Booker World*, 37 McGeorge L.Rev. 757 (2006); Note, *Cracking Down on White-Collar Crime: An Analysis of the Recent of Severe Sentences for Corporate Officers*, 40 Suffolk U.L.Rev. 685 (2007).

The record in this case is perfect for setting such standards.

1. The Sosa Transaction

At sentencing the Court refused to order restitution to Sosa, stating that, to award $80,000 to Sosa, "would require the Court to act as a paymaster among thieves, because the purchaser, Sosa, was also participating in the fraud. . . Both participants set out to defraud the mortgage lender. Both succeeded. And to award restitution to one from the other under these circumstances as to Count 1 would be inappropriate." (A. 324-325). Hence, there is no "loss" to Sosa.

In any event, the facts show no "loss" whatsoever. The record shows that in 1999, Georgina Sosa discussed with Larry King, whom she met through her sister, that she wanted to buy the house located at 175 Orchard Street. (Tr. 426-427). King subsequently introduced her to Mr. Thaler. As of June 7, 1999, the property had an appraised value of $288,000. (DX P).

Sosa understood that her obligation to purchase the property at 175 Orchard Street was to pay $10,000 down and to obtain a mortgage for $230,000, for a total purchase price of $240,000. *Id.* at 471. After the closing, Sosa asked Thaler to install additional or alternative heating in the house. (Tr. 476-477). Mr. Thaler changed the heating from electric to gas at his own expense. *Id.* As of November 10, 2001, the property's appraised value had increased to $295,000. (DX O).

Sosa refinanced her loan at a lower rate in 2004. (Tr. 446-447, 472). This had the effect of satisfying the mortgage she had received from Columbia Equities in 1999. (DX a-F; Tr. 447). Sosa recently moved from the property and, at the time of the trial, she received rental income on two apartments there. (Tr. 472).

Sosa not only owns a home that has increased in value while she has lowered her mortgage payments, but she also receives rental income from the property. The mortgage from Columbia Equities was satisfied in full when Ms. Sosa refinanced.

The Probation Department claimed that Mr. Thaler defrauded Ms. Sosa of $80,000, because he bought the property for $160,000 and sold it to her through Hathone Corp. for $240,000, and the Government argued in summation that Sosa "lost" $58,000 (Tr. 1467). Although there was evidence showing that Thaler acted as her agent and therefore had a conflict of interest as the seller in the transaction, this did not translate into a "loss" to Sosa. There is no obligation in any real estate transaction for the seller to disclose how much he purchased the property for. Sosa never testified that she would not have purchased the property had she known her agent had just purchased it for $160,000. Sosa could not have purchased the property for $160,000, and she could not have purchased it for any amount without Mr. Thaler's help in obtaining a mortgage for her.

More important, when Thaler contracted to purchase the property, it did not have a certificate of occupancy and it had violations. Its condition was such that a bank would not have provided a mortgage on it. Thaler remedied these defects in order to ready the property for sale. To say that Mr. Thaler defrauded Ms. Sosa out of $80,000 is either to say that he usurped from her an opportunity to buy the property at $160,000, which he did not, or that he was obligated to re-sell the property to her at cost, which would not have happened even if he had disclosed his interest in the property.

In short, Ms. Sosa obtained something of value—that continues to increase in value—that she would

not otherwise have obtained but for Mr. Thaler's involvement. She has a three-family home that generates rental income, as well as two additional vacant lots that came with the property. (GX 76). Neither she nor the lender incurred any form of loss.

2. Gilbert Richardson/Alicia Trail/ Hector Robinson

In 2000, when Gilbert Richardson could no longer pay the two mortgages on his property, he tried to sell the house and an adjoining lot. (Tr. 903-904, 923). His real estate agent, Lisa Johnson, assisted him in his attempt to sell the property to one Giovanni Soto for $235,000 (Tr. 916, 1306-1307). Soto planned to sell the house to Alicia Trail and retain the vacant lot for himself, for a total of $235,000. (Tr. 1309; DX G). This deal, however, did not close. (Tr. 1309-1310).

When Richardson met Thaler, the properties had been listed for a year and Richardson was "desperate" to sell the house and lot so that he would not keep falling behind on the mortgage payments. (Tr. 923-925; A. 158-159). His main concern and objective in the sale was to be relieved of his mortgage and payments. (Tr. 925-926; A. 159-160). Indeed, he testified that he did not care who bought the property or in what form. *Id.* If a buyer had been brought to him, before he met Thaler, who was willing to buy the property at a price that would allow him to pay off the mortgages, he would have sold the property. (Tr. 927; A. 161).

Mr. Thaler ultimately helped to arrange the sale of the whole property for $250,000, $15,000 *more* than the previous deal and $250,000 more than the absence of any deals in the year before Richardson met Thaler. The house was conveyed to Trail and the vacant lot was conveyed to Mr. Thaler's company, similar to the way the vacant lot was originally to be retained by Soto. Indeed, the Richardson to Trail and Thaler sale was similar in basic structure to the Richardson to Soto and Trail deal, except that Mr. Richardson *received more money*. In both transactions, Richardson was to part with the house and lot in a single transaction and different parties received the house and lot.

After the closing, Richardson was relieved of his mortgage debts and thus his objectives were met and fulfilled. (A. 160). He received more than $2,000 as a result of the closing. (Tr. 928). Richardson sold the property to Trail at a fair price, indeed at a higher price than he had previously been offered, under circumstances where he was desperate to get out from under the mortgage payments on the property. He was not in a position, nor, according to his testimony, was he inclined to hold out for a better deal by selling the properties separately. Appraisals showed that he received a fair price on the sale.

3. The Best Estate

Ester and Herbert Best were married on August 20, 1977. At the time of their marriage, Ester Best owned the house at 2917 Tenbroeck Avenue and

she had a mortgage in the amount of $35,650.00. (GX 58). The couple separated in 1979, when Herbert Best moved out of the house. (Tr. 953,966). Neither Herbert Best nor any other person in this family had any contact with Ester Best after that time. (Tr. 959-960).

Ester Best lived in the house until her death on August 21, 1991. (GX 56). After her death, Ester's cousin, Vastina Wilson, continued to live in the house and make the mortgage payments until 1999, at which point she could no longer afford to make them and subsequently moved out. (Tr. 966-968). Ms. Wilson testified that she got a notification from the mortgage holder that there was a foreclosure action by the bank on the house. (Tr. 971). She also received letters addressed to Ester Best regarding the amount owed on the mortgage and she responded to some of the letters to notify the bank that she was trying to bring the payments up-to-date. (Tr. 971-972).

Herbert Best died in 1997. (GX 57). Enid Williams, his sister, testified that she was not aware that Herbert Best owned or had any interest in a home at 2917 Tenbroeck Avenue. (Tr. 958).

On February 9, 2000, a judgment of foreclosure and sale was rendered on the property in favor of HomeSide Lending, Inc. for $22,907.98 plus interest. (GX 58).

Mamie Kemper subsequently purchased the home for $165,000 in September 2000. (GX 60).

The Government and the probation department took the position that the Best Estate suffered a loss of $165,000, the purchase price of the home. First, both the amount of the outstanding mortgage judgment, interest, seller's closing costs, allowable buyer's closing costs paid by the seller, and repairs should have been deducted from that number. *See* U.S.S.G. § 2B1.1(3)(D)(i). Moreover, based on all the evidence adduced at trial, there is no reasonable probability that the Best Estate would ever have been located and received any of the proceeds had the property been sold at auction. As the petitioner attempted to adduce at trial and argued at sentencing, the attorney for Homeside Lending, Inc. thought he had served Herbert Best in connection with the foreclosure proceedings, even though Best was deceased. The Affidavits of Service for Ester Best and Herbert Best were proffered at trial (Tr. 1376-1378; A. 179-181) and submitted to the court at sentencing. *See* Defendant's Sentencing Memorandum, Exhibit A. Given the status of the foreclosure action, it was all the more unlikely that any representative of the Best estate would have been located in order to disperse any theoretical proceeds generated at auction. Rather, as counsel sought to adduce through the attorney who handled the foreclosure action, when properties are sold at auction, the costs and fees and any additional liens or judgments are deducted and then the property often sells for little, if anything, over mortgage and costs, because purchasers are there looking for bargains, not market-priced deals. (Tr. 1180; A. 174)

Thus, there was no evidence from which to conclude that the Best Estate lost property it knew nothing about and that Herbert Best had abandoned.

4. Nancy Smith

Thaler's sole involvement in this transaction was to make a loan to Larry King at King's request. Thaler did not participate in locating the purchaser, submitting the application or in the closing.

Nancy Smith purchased the home located at 437 South 5th Avenue from her sister and brother-in-law, Cynthia and Reginald Owens, on August 8, 2000 for $215,000 with a $193,500 mortgage from Columbia Equities. (GX 97). The property's appraised value was $245,000. (DX K). Ms. Smith died in November 2001. (Tr. 640).

Indymac purchased the mortgage from Columbia Equities for $193,188.72 on December 8, 2000. (GX 183). Indymac sold the loan as a non-performing mortgage to EMC Mortgage Corporation for $143,925.60 in June 2002, a $49,263.12 discount. (GX 183). Subsequently, Indymac received an indemnification of $33,428.58 from Columbia Equities. (GX 99-C, 99-F). The government conceded that Indymac's only loss under the guidelines was $15,834.54, because the guidelines exclude "interest of any kind" from loss. (A. 338). *See* U.S.S.G. § 2B1.1, Application Note 3(D)(i).

At the time of trial, EMC Mortgage Corp. was in contract for the sale of the property for $300,000.

(Tr. 807). At sentencing, the defendant showed that the property was sold in December, 2005, and that EMC received $295,784.45 (after taxes and closing costs) from the sale. *See* Defendant's Sentencing Memorandum, Exhibit B.

At the time the loan became non-performing, Indymac had collateral worth at least the appraised value of $245,000, or $53,000 more than the mortgage. *See*, *United States v. Lane*, 323 F.3d 568 (7th Cir. 2003). For whatever reason, Indymac made a business decision to sell the loan at a discount, foregoing a potential profit at about $100,000 less expenses. Since Indymac had collateral valued in excess of the mortgage, it did not incur a loss that can be attributed to Howard Thaler. *See*, *Lane*, 328 F.3d 568. Similarly, that Columbia Equities made a business decision to settle with Indymac on a group of loans does not mean that it suffered a loss caused by Howard Thaler. (GX 99-F).

According to the Guidelines, U.S.S.G. § 2B1.1(3)(b)(ii), "loss shall be reduced by":

> In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

At the time of trial, the collateral had not been disposed of; however, there was evidence that its market value was $300,000.00. Despite Indymac's

business decision to sell the note rather than dispose of the collateral, the value of the collateral was available upon disposition had Indymac chosen to liquidate the property. No one suffered any "loss."

5. The Restitution

Restitution on *each* of the transactions must also be recomputed. *See, United States v. Rhodes*, 330 F.3d 949 (7th Cir. 2003). The computation of "loss" and "restitution" have similar components, but sometimes, as where there is no actual loss, the calculations may result in different figures. *See, United States v. Fazio*, 487 F.3d 646, 660 (8th Cir. 2007). (Error made in guidelines computation made no difference but case had to be remanded for recalculation of restitution, because improvements and costs were not deducted as they should have been.)

Here, too, the improvements and costs were not deducted. More important, even the district court believed that the restitution awarded to one "victim," Richardson, amounted to an unwarranted "windfall," but awarded the amount nonetheless. (A. 336). That, too, implicates due process concerns.

D. The Court of Appeals Applied an Erroneous Harmless Error Test at Variance With the Decisions of This Court

The question whether harmless error was properly found is somewhat fact specific and ordinarily would not justify a grant of certiorari. Here, however, the deviation is clear and clarification is warranted in light of this Court's recent decision in *Fry v. Pliler*, __ U.S. __, (June 11, 2007).

Here the Court of Appeals found, correctly, that the admission of the text of an order of a state appellate court disbarring petitioner from the practice of law was probably error. Nonetheless, it found the error "harmless beyond a reasonable doubt," because petitioner did not dispute the documentary evidence or proof concerning the transactions at issue. Although that may be true, the order was offered on the issue of fraudulent intent, which *was* the key dispute at trial.

No claim was, or is, made that the error is of constitutional magnitude. Thus, the standard is not whether the error was harmless beyond a reasonable doubt, but the standard set forth in *Kottoakos v. United States*, 328 U.S. 750, 765 (1948), namely whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *See*, *Fry v. Pliler*, ___ U.S. ___ (2007). Under that test, an appellate court must have a "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by

the error." *Kottoakos*, 328 U.S. at 765; *See*, *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

When the error impacts the core issue in the case, criminal intent, and such criminal intent is disputed, the error cannot be harmless. It had an obvious impact, because the jury was told that a state appellate court had already found that the defendant had engaged in unethical conduct, which the Government stressed in summation. Indeed, it even impacted the judge, who called petitioner a "poor excuse for a lawyer." Such an error is, by definition, prejudicial under settled jurisprudence.

CONCLUSION

Because important issues of law of national importance are impacted, the *writ of certiorari* should be granted.

Dated: Otisville, New York
September, 2007

Respectfully submitted,

HOWARD THALER
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Reg. No. 84067-054
Otisville Camp
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Otisville, New York 10963

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Catherine O'Hagan Wolfe
CLERK

Date:

Docket Number:	06-1263-cr
Short Title:	USA v. Thaler
DC Docket Number:	04-cr-1204
DC:	SDNY (WHITE PLAINS)
DC Judge:	Honorable Charles Brieant

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ___ day of June, two thousand seven.

No. 06-1263-cr
Filed: June 8, 2007

USA v. Thaler

ORDER

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the

appellant HOWARD THALER. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Catherine O'Hagan Wolfe, Clerk

By: [ILLEGIBLE SIGNATURE]
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT http://www.ca2.uscourts.gov), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of April, two thousand seven.

No. 06-1263-cr

PRESENT:

HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,
Circuit Judges,
HON. JED S. RAKOFF,
*District Judge.**

HOWARD THALER,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

For Defendant -Appellant:	GERALD L. SHARGEL, New York, NY (Susan C. Wolfe, Hoffman & Pollok LLP, New York, NY, *of counsel*).
For Appellee:	ELLIOTT B. JACOBSON, Assistant United States Attorney for the Southern District of New York, (Michael J. Garcia, United States Attorney for the Southern District of New York, Celeste L. Koeleveld, Assistant United States Attorney for the Southern District of New York, *of counsel*), New York, NY.

SUMMARY ORDER

Appeal from the United States District Court for the Southern District of New York (Charles L. Brieant, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be, and it hereby is, AFFIRMED.

Defendant-appellant Howard Thaler appeals from a March 9, 2006 judgment convicting him of nine substantive counts of mail fraud, wire fraud, and making false statements, and one count of conspir-

acy to make false statements and commit mail fraud. The convictions arise from various fraudulent real estate transactions. Familiarity with the facts and procedural history of this case are here assumed. Thaler now raises multiple issues on appeal.

First, Thaler challenges various evidentiary rulings by the district court. "We review evidentiary rulings for abuse of discretion, and we will vacate a conviction on the basis of an evidentiary ruling only if we conclude that there was a violation of a substantial right." *United States v. Dupre*, 462 F.3d 131, 136 (2d Cir. 2006). The FBI agent who overheard Thaler's comment to his attorney was permitted to testify as to what he heard. Attorney-client privilege attaches only to confidential communications, and Thaler indisputably uttered the challenged statement while an FBI agent was sitting at the same table as Thaler and his counsel. The district court also acted well within its discretion in refusing to permit testimony by a proposed defense witness on the grounds that it was not probative and was likely prejudicial.

Thaler's third evidentiary challenge is also without merit. During the Government's case-in-chief, the district court permitted the admission of the full text of a New York Appellate Division order barring Thaler from the practice of law. Although no hearsay challenge was raised at trial, we doubt that the disbarment order was properly admissible under Fed. R. Evid. 807 as the Government now contends. As to much of the text of the order, we also question the district court's determinations that the probative value of the order was not "sub-

stantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403; *see Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993).

But any error in the admission of the text of the order was harmless beyond a reasonable doubt. Thaler never contested the facts underlying the crimes charged in the instant case. He admitted that he knowingly falsified loan applications; that he purported to represent several of the buyers in the fraudulent transactions as their counsel even though he was disbarred; and that, when he or his coconspirator had proprietary interests in the properties to be sold, he knowingly did not disclose his conflict of interest. His basic defense that he contemplated no harm was, in this context, one that could not have persuaded any reasonable juror. Moreover, the jury's acquittal of Thayer on the obstruction of justice count belies defense counsel's assertion at oral argument that the admission of the disbarment order improperly tainted Thaler as a "bad man." *See United States v. Stewart*, 433 F.3d 273, 310 (2d Cir. 2006).

Second, Thaler contests the sufficiency of the evidence as to his mail fraud convictions, on the ground that the government failed to demonstrate that he "use[d] . . . the mails in furtherance of" his fraudulent scheme. *United States v. Altman*, 48 F.3d 96, 101 (2d Cir. 1995); *see* 18 U.S.C. § 1341. It is sufficient, however, if the mailing is "incident to an essential part of the scheme, or a step in the plot," *Schmuck v. United States*, 489 U.S. 705, 711 (1989) (internal citations, alteration and quotation marks omitted).

In *Schmuck*, the Supreme Court held that mailings of car titles to the state by a defrauded car retailer on behalf of his buyers were "incident to an essential part" of *Schmuck*'s scheme to defraud those retailers by selling them cars with rolled back odometers. The Court reasoned that, ultimately, the success of *Schmuck*'s fraudulent scheme depended upon his continued relationship with the unwitting dealers, which, in turn, was predicated on those dealers being able to resell the cars. *Schmuck*, 489 U.S. at 711-12. Here, the evidence demonstrated that Thaler had an ongoing relationship with the loan officer who worked with both of the purchasers in the two transactions at issue. Thaler's case is therefore directly analogous to *Schmuck*. Just as the resale of the cars was essential to *Schmuck*'s scheme because he needed "to retain the custom and confidence of the retailers," *United States v. Slevin*, 106 F.3d 1086, 1090 (2d Cir. 1996), here, a rational juror, considering the evidence in the light most favorable to the Government, could have inferred that Thaler's relationship with the loan officer meant that he could not afford to have the lender bear the loss of his fraudulent loan applications. Such a loss might have put the loan officer's employment in jeopardy, which, in turn, might have impaired his ability to procure fraudulent loans from the lender for his buyers. *See id.* at 1089-90. Consequently, the scheme contemplated by Thaler included the very kind of mailings here relied on by the Government.

Third, Thaler asserts that the district court erred in calculating the applicable range under the United

States Sentencing Guidelines. An application of the Guidelines to the facts in a specific case is a mixed question of law and fact. *See United States v. Vasquez*, 389 F.3d 65, 75 (2d Cir. 2004). To the extent we review a factual finding, review is for clear error, and to the extent we review or invoke a legal conclusion, review is *de novo*.

The district court's finding that Thaler's fraudulent acts caused a loss between $200,000 - $400,000 is not clearly erroneous. Nor did the court err in enhancing Thaler's base offense level both for violation of a judicial order and for abuse of a position of trust. The two enhancements address different harms: Thaler's abuse of his position of trust harmed those who were directly deceived by his having held himself out as a real estate attorney to advance his scheme, but his violation of the disbarment order not only harmed individuals involved in the transactions but also threatened the Appellate Division's supervisory authority over the bar. *See United States v. Maloney*, 406 F.3d 149, 153-54 (2d Cir. 2005). The latter harm was "not addressed elsewhere in the guidelines." U.S.S.G. § 2B1.1(b)(7)(C) (2002). Finally, Thaler argues that the evidence is insufficient to support the district court's two-level enhancement for obstruction of justice. But the district court's recitation of the evidence in ruling that the obstruction enhancement applied—including quotations of transcript excerpts that Thaler does not here attempt to explain away—is plainly sufficient to meet the preponderance standard, Thaler's acquittal notwithstanding.

We have considered Thaler's remaining arguments regarding purportedly prejudicial statements by the district judge and the prosecutor and the reasonableness of his below-Guidelines sentence, and we find them without merit.

Accordingly, for the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

For the Court,
THOMAS ASREEN,
Acting Clerk of the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 04 Cr. 1204 (CLB)

UNITED STATES OF AMERICA,

Plaintiff,

— against —

HOWARD THALER, ET AL,

Defendants.

MEMORANDUM AND ORDER

Brieant, J.

Pending before this Court for decision is a renewed motion for bail pending appeal pursuant to 18 U.S.C. § 3143(b). Familiarity on the part of the reader with the superseding indictment and the underlying trial is assumed.

On December 1, 2005, a jury convicted Mr. Thaler, a former attorney, of conspiring to commit fraud and making false statements and for multiple substantive counts of mail and/or wire fraud arising out of six separate real estate transactions and acquitted him of the remaining counts in the indictment. A motion made pursuant to Rule 29(c)

was denied by this Court and on March 9, 2006, the Court sentenced the Defendant to a substantial term of imprisonment which was below the Advisory Guideline Computation in the case, and ordered restitution in the amount of $522,496.54 together with a fine of $250,000.00 and an assessment under the Crime Control Act of $1,000.00. The Court declined to award restitution with respect to one of the counts on the theory that the victim was herself a participant in the crime charged.

Surrender was initially ordered for May 8, 2006, later extended with the consent of the Government to June 8, 2006. The Court declined to stay execution of the judgment apart from staying payment of the fines pending the appeal.

In this renewed motion, Defendant points out that he has paid a substantial portion of the Court's Restitution Order and is neither a flight risk nor a danger to the community by reason of any propensity to commit violent crime. He contends as a basis for the motion that he "intends to raise on appeal a number of issues that, if found in his favor, will result in a reversal or a new trial, or a sentence that is less than the expected duration of appeals in the Second Circuit."

Familiarity with the relevant statute affecting bail pending appeal on the part of the reader is assumed. At issue is whether the appeal raises a substantial question of law or fact, likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment or a reduced sentence to a term of imprisonment less than the total of the time already served plus the

expected duration of the appeal process, 18 U.S.C. § 3143(b)(B).

Our Court of Appeals, recognizing that if the trial court thought that the appeal raised such issues, it would probably have granted the Rule 29 motion, refined the statutory criteria in *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985), holding that a substantial question does not mean that the trial court has to second-guess itself or predict the outcome of the appeal.

We are now informed for the first time that the appeal will be based essentially on a review of the sufficiency of the evidence on several counts as well as denial of a fair trial and the claim that the sentence is "unduly harsh and unreasonable in light of the degree of 'real world' harm that resulted from the conduct."

A Defendant attacking a conviction on grounds of insufficiency bears a heavy burden. Viewing the evidence in the light most favorable to the Government, it is sufficient to support intention or contemplation on the part of Mr. Thaler of some harm to the victims. In any situation where a borrower or someone acting for the borrower lies about or withholds material information in connection with a credit application or mortgage transaction, he or she at the very least deprives the lender of the intangible right to control the use of its own assets, and also harms the lender by diminishing the ultimate value of the mortgage transaction to the bank as defined by its standard lending practices including the likelihood of resale of such loans. This is true whether or not a subsequent default ensues.

See United States v. Dinome, 86 F.3d 277, 280 (2d Cir. 1996).

The evidence in this case shows that the Defendant and his co-conspirators intentionally provided false information to the lending institutions with respect to the bank fraud counts, about the assets and the income of the borrowers as well as the selling prices of the properties, and the amount of the down payment. On several occasions, Defendant furnished funds placed in deposit to the credit of the borrower's bank account until the credit report had been prepared, which funds he immediately recaptured.

Materiality was clearly proved by competent evidence at the trial and the fact that most of the borrowers either refinanced or sold their property at a profit and paid off the lenders does not serve to prevent conviction.

With respect to the Richardson lot mentioned in Count 7, the evidence showed that Mr. Thaler who acted as Richardson's attorney, directed Richardson to sign the deed to B-30 Corporation, a company wholly owned by the Defendant and his partner and co-conspirator Bill Falow. Two days later, the Defendant sold the vacant lot to a corporation owned by Hector Robinson for $35,000.00 pursuant to a pre-existing arrangement which they had with Robinson. Clearly, this was a fraud on Richardson, executed by failing to explain to Richardson that the lot was going to a company which was controlled by Thaler and Falow, who had a preexisting agreement to sell it to Robinson for $35,000.00. Richardson was denied the honest

professional services of a person whom he believed to be his attorney, and to the value of the vacant lot. It is of no significance that Richardson was more than happy to dispose of the entire parcel (a residence with a vacant lot to the rear) for the actual total price for which the residence was sold to Trail. That the deal was a better deal than a prior deal which Richardson had, which had fallen through, and the fact that Richardson was "desperate" to dispose of his property is of no significance. The jury was entitled to find that actual harm existed as a natural and probable result of the fraudulent scheme and therefore fraud could be inferred. *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994).

Similarly, with respect to Count 8, the evidence viewed most favorably to the Government as it must be, shows that Mr. Thaler or Mr. Falow paid a shill to impersonate Herbert Best at a closing of title to the property, and they pocketed the profits which this Defendant shared with Falow.

There is simply no merit to the claim that the numerous mailings and use of wires in connection with the loan transactions were not in furtherance of the schemes to defraud. The trial jury was properly charged and the "furtherance" element was properly instructed in the jury charge.

Apart from the contention of insufficiency of evidence, Mr. Thaler also claims that there were evidentiary rulings made at the trial which were in error. Our Court of Appeals has recognized "The perfect trial . . . is as rare as the perfect crime" to *United States v. Corey*, 566 F.2d 429, 433 (2d Cir.

1977). The Court has reviewed its evidentiary rulings and believes that all of them were appropriate and within the scope of its discretion. To the extent there was no contemporaneous objection, they certainly do not rise to the level of plain error.

Defendant also raises, as error, the exclusion by this Court of the proffered testimony of the witness, attorney John DiCaro. This testimony relates only to the Best fraud. Mr. DiCaro, an attorney practicing in Rochester, New York, represented a lender holding an existing mortgage on the Best residence. The mortgage was in default. Apparently, Mr. DiCaro believed or assumed, based on his title search, that Best was still alive. He never communicated this belief concerning Best to the Defendant. Apparently, he sent the Summons and Complaint in the foreclosure action out for service to a professional process server who produced an Affidavit of Personal Service of Process on both of the Bests at the premises. In truth and in fact, both Herbert Best and his wife were long since deceased, with the husband dying last. A Judgment of Foreclosure was entered by DiCaro, but there was never a sale pursuant to the judgment. Had this occurred, the case might have been different. Thaler and Falow, as assignees of the Judgment, did not hold a judicial foreclosure sale, possibly because they did not wish to open the bidding to outsiders or create a surplus money fund if the property sold for more than the amount of the judgment, as it likely would have. Instead, they hired the imposter to issue a deed under the name of Herbert Best. Although DiCaro acted in good faith,

apparently in reliance on his process server's Affidavit of Personal Service on both of the deceased Bests, there is no evidence whatever from which Defendant could claim that he knew about it or relied on it, and the affirmative act of the participants in paying the shill who signed the deed under the name of Herbert Best combined with that fact suggests that the testimony of DiCaro would have been confusing to the jury and not helpful to the Defendant.

No motion was made pretrial to suppress the statement of Thaler in the presence of Special Agent Logallo, so that this point is waived. The Logallo statement was not of particular significance to the conviction, and was at most cumulative evidence.

Insofar as concerns a statement made by this Court in ruling on a question having to do with the "comfort" of banks generally, the Court notes that it emphasized on more than one occasion during the trial that it held no belief as to the guilt or innocence of the Defendant, and that such decision was solely for the trial jurors to make, based on the evidence. The instructions given to the jury are fully supportive of that position.

Most of Defendant's contentions of trial error seem to this Court to be dilatory, and bordering on the frivolous. The Court could not say, based on the submissions before it, that there is a substantial question or close question being presented, nor is there anything to suggest that all counts of conviction would be reversed on appeal or, for that mat-

ter, that any of the surviving counts would be reversed.

The Court adheres to its prior decision in the matter and declines to grant bail pending appeal, and declines to extend the date of surrender beyond June 8, 2006.

X

X

X

SO ORDERED.

Dated: White Plains, New York
May 17, 2006

/s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

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